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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~412.~~ 202

DAVID TURNER, APPELLANT,

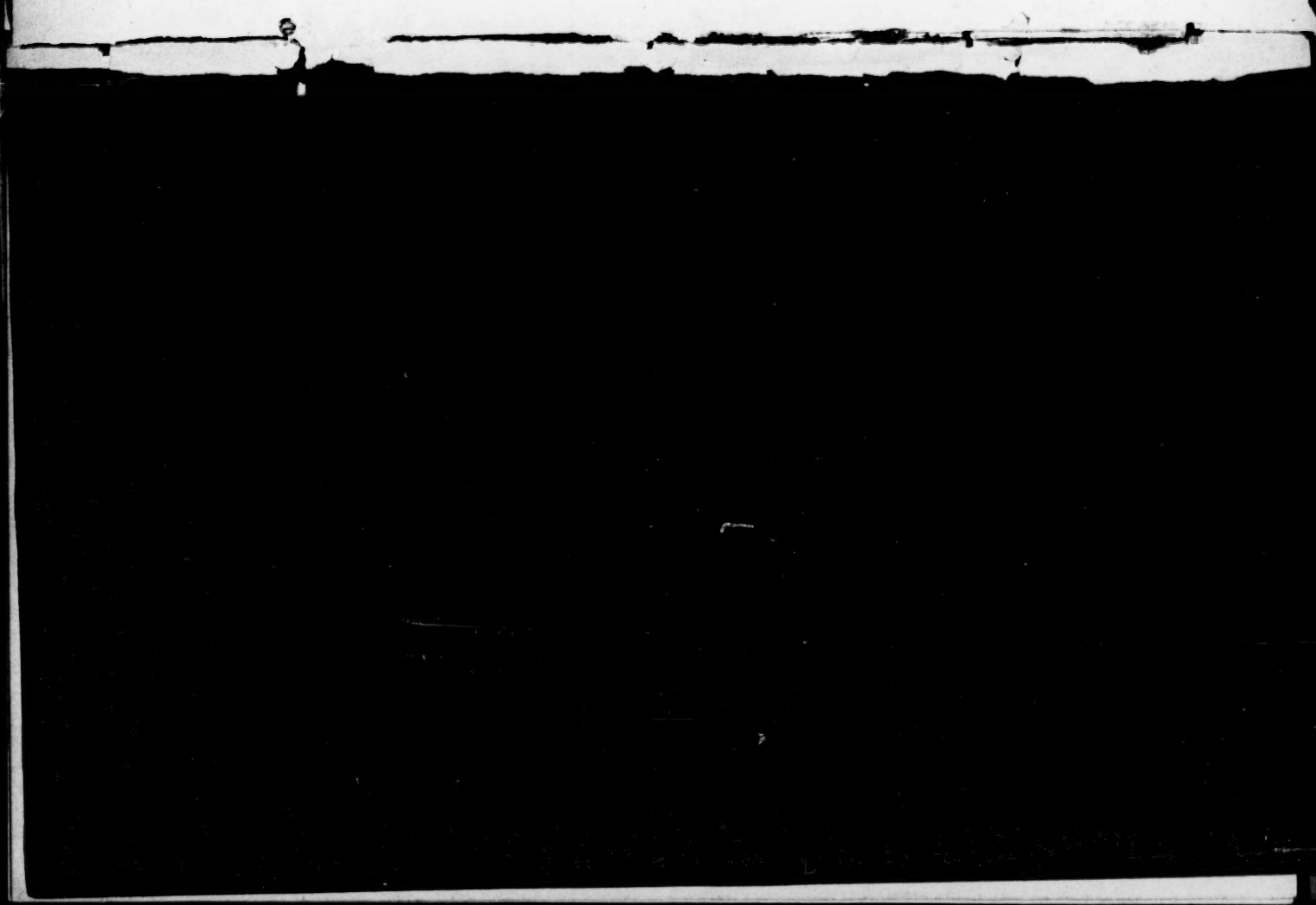
vs.

JAMES M. SMITH.

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA.

FILED DECEMBER 15, 1870.

Dec 1871



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1 To the Honorable S. P. Chase, Chief Justice of the Supreme Court of the United States.

Your petitioner, David Turner, of the city of Alexandria, in the State of Virginia, respectfully represents that, at the recent term of the supreme court of appeals of Virginia, the highest appellate court of said State, a final judgment was rendered against your petitioner, in a suit taken upon appeal to said court, in which your petitioner was appellant, and R. M. & J. M. Smith were appellees. Your petitioner further shews that in said suit was drawn in question the validity of a statute of the United States, entitled "An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes," approved June 7th, 1862, and of the authority exercised under the same, and that decision was adverse to the right and title of your petitioner, as claimed under such statute, all of which will appear by a copy of the record in said suit, and necessary certificates accompanying the same. Your petitioner states that he is aggreived and subjected to great damage by reason of the judgment aforesaid. Your petitioner prays that a writ of error may issue from your honor's court,
2 with the necessary citations, &c., to bring up for review and correction the said judgment of the supreme court of appeals of Virginia, and that the said writ of error may operate as a supersedeas to any proceedings on said judgment. All of which is respectfully submitted.

DAVID TURNER.
By FRANCIS L. SMITH,
His Counsel.

(Indorsed:)
Writ allowed as prayed, Oct. 2, '68.

S. P. CHASE,
Ch. Jus. U. States.

3 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable the judges of the supreme court of appeals of the Commonwealth of Virginia, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of appeals of the Commonwealth of Virginia, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between David Turner, appellant, and Richard M. Smith and James M. Smith, appellees, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the
4 decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said David Turner, as by his complaint appears: We, being willing that error, if any hath been, should be duly corrected,

and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and sixty-nine.

Issued 19th January, 1870.

D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Allowed by—

S. P. CHASE,
Chief Justice U. States.

5 The United States of America to Richard M. Smith and James M. Smith, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error, filed in the clerk's office of the court of appeals of the Commonwealth of Virginia, wherein David Turner is plaintiff in error, and you are defendants in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the United States, this 19th day of January, in the year of our Lord one thousand eight hundred and seventy.

S. P. CHASE.

6 Service of this citation this day made on us.
Feb'y 19, 1870.

GEORGE W'M BRENT.
C. W. WATTLES,
Att'ys for Smith.

7 Know all men by these presents that we, David Turner, are held and firmly bound unto Richard M. Smith and James M. Smith, in the full and just sum of three hundred dollars to be paid to the said Richard M. Smith and James M. Smith, certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this day of October, in the year of our Lord one thousand eight hundred and sixty-eight.

Whereas lately, at a supreme court of appeals of the Commonwealth of Virginia, in a suit depending in said court, between David Turner, appellant, and Richard M. Smith and James M. Smith, appellees, judgment was rendered against the said David Turner, and the said David

Turner having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Richard M. Smith and James M. Smith, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington the first Monday of December next:

Now, the condition of the above obligation is such, that if the said David Turner shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

DAVID TURNER. [L. S.]
F. E. CORBETT. [L. S.]

Sealed and delivered in presence of—
SAMUEL BAKER.

Approved by—

S. P. CHASE, *Ch. Jus.*

8 To the hon'ble judges of the supreme court of appeals of Virginia:

Your petitioner, David Turner, would respectfully shew that he is ag'rieved by a judgment of the district court of the fourth judicial district of Virginia, rendered on the 10th day of January, 1868, in a suit wherein your petitioner is appellant, and R. M. & J. M. Smith are appellees. A copy of the record in the case, with a copy also of the judgment of the said district court, is presented herewith. Your petitioner further shews that said judgment was rendered upon a supersedeas, granted to a judgment of the circuit court for Alexandria County; and for the causes of error for which said supersedeas was granted, your petitioner begs leave to refer to the petition contained in the said record, and which was presented to the said district court.

9 Your petitioner further shews that the said judgment of the district court was entered pro forma, and states that the said case involves questions of novelty and difficulty, such as to make it proper that it should be finally determined by the supreme court of appeals.

Your petitioner therefore prays your honor to grant him an appeal and supersedeas to said judgment of the district court above referred to.

Respectfully submitted.

THE PETITIONER,
By his Counsel.

I, Francis L. Smith, an attorney practising in the supreme court of appeals of Virginia, do certify that, in my opinion, there is error in the judgment of the district court of the fourth judicial district of Virginia, complained of in the foregoing petition, and that the same should be reviewed and reversed.

Jan'y 25th, 1868.

FRANCIS L. SMITH.

10 VIRGINIA:

At a supreme court of appeals, held at the capitol, in the city of Richmond, on Tuesday, the 28th day of January, 1868—

Upon the petition of David Turner a writ of supersedeas is awarded him to a judgment rendered by the district court held for the fourth judicial district, at the town of Fredericksburg, on the tenth day of

January, 1868, affirming, with costs, a judgment recovered by Richard M. Smith and James M. Smith, against David Turner, in the circuit court of Alexandria County, on the twenty-eighth day of June, 1867, upon the said petitioner's entering into bond, with sufficient security, in the clerk's office of the said district court, in the penalty of five hundred dollars, conditioned as the law directs.

11 To the honorable judges of the district court of appeals at Fredericksburg, Va:

Your petitioner, David Turner, respectfully represents, that he feels aggrieved by a judgment of the circuit court of the county of Alexandria, rendered at the June term, 1867, in a suit on the common law side of said court, in which R. M. & J. M. Smith were plaintiffs, and your petitioner was defendant, a certified copy of the record, in which said suit, is herewith filed as an exhibit, marked A.

The judgment was rendered on a forthcoming bond, given to relieve the property of your petitioner, which had been levied on, under a distress warrant. The facts out of which this litigation has grown are fully set out in the special verdict. The record shows, (page 22, 23,) that, on the 1st of March, 1864, your petitioner purchased at a public sale, made by United States tax commissioners, the real estate therein mentioned, for the sum of seventeen hundred and fifty dollars; that, upon the payment of the purchase-money, the said commissioners delivered to your petitioner a certificate evidencing his said purchase, as directed by the act of Congress, in such case made and provided; and therefore, the said real estate, was delivered to your petitioner, and has ever since been held by him, without any adverse claim until the institution of the proceedings in this suit. The plaintiffs, in the distress warrant, claim that, although the said sale was in all respects regular, and that by it a fee-simple title to the property passed and became vested in your petitioner, yet, the said real estate is subject to a rent-charge of $224, created by a deed from William H. Hannon and wife to William S. Moore, dated the 19th day of November, 1819. A copy of this deed will be found in the record. The special verdict finds that said "William H. Hannon died insolvent, in or about the year 1821, and that thereupon, or shortly thereafter, the said Moore took possession of the said premises, and so continued until sold by R. I. Taylor, under a deed of trust," &c. Whether Moore made a formal reëntry under the covenants of the deed or not is not proven by positive evi-
12 dence, but your petitioner insists that the fair legal inference and presumption from all the facts stated in the special verdict that there was a regular reëntry upon the property. From 1821 to the 1st of March, 1864, the real estate so purchased by your petitioner was in the actual possession, under claim of title, of those under whom the said R. M. & J. M. Smith held for forty-three years, a period long enough to bar any possessory action which could have been brought, in Virginia, for its recovery. The taxes, during this long period, were assessed on the real estate, not on the rent-charge, and were paid by the parties thus in possession. The parties to the intermediate conveyances seem to have acted on the idea that a grant of the rent-charge would pass the absolute right to the real estate out of which it issued. During this long period of forty-three years, there does not appear to have been any persons occupying the relative characters of landlord and tenant, but the parties in possession acting and controlling the property as the actual owners of the soil in fee-simple. The deed from Tho's Irwin and

others to R. M. and J. M. Smith, dated 21st of March, 1854, (rec. page 15,) conveys, not only this rent-charge, but likewise "all the right, title, and interest, in law or equity, which they (the grantors) have or hold in and to the lot of ground aforesaid derived from any source whatever." Your petitioner therefore submits, that at the date of the sale on the 1st day of March, 1864, at which he purchased, the said R. M. & J. M. Smith, by virtue of a previous reëntry on said property, or by limitation, had acquired, claimed, and held the absolute fee-simple title to the said real estate. That by one of these modes the rent-charge had become merged in the original estate, and the title to the property, the corpus of the estate, stood at the time of said sale, as if no such rent-charge had ever been created. Thus it is said in the books, that when the inheritance comes to the particular estate, from whatever cause, the particular estate is drowned. So that whenever a collateral right or interest becomes vested in the owner of the inheritance, the latter is merged in the greater estate, and ceases to exist—it is extinguished. See Mayhew on Merger, p. 8.

The plaintiffs themselves claimed the absolute property in question, (not the ground-rent only,) by permitting it, for a long series of years, to be assessed to them, and by paying the taxes thus assessed against it.

They are now estopped in pais from falling back upon a lesser
13 estate, and claiming that the rent-charge, and the reversion, were, at the date of said sale, separate and distinct estates.

Your petitioner further shews that, by the act of the Congress of the United States, of June 7th, 1862, sec. 4, it is provided that "the title of, in, and to, each and every piece or parcel of land, upon which said tax has not been paid, as above provided, shall thereupon become forfeited to the United States, and upon the sale hereinafter provided for, shall vest in the United States, or in the purchasers at such sale in fee-simple, free and discharged from all prior liens, incumbrances, right, title, and claim whatsoever."

The language of this act is broad and sweeping, and unless it can be shown that a rent-charge is not a lien, incumbrance, or claim upon the property, there cannot be any doubt as to the legal effect of this law. It was, doubtless, the intention of Congress, that the purchaser under such a sale, should take a clear and absolute estate of inheritance in fee, and this upon the presumption, that any one holding an incumbrance upon the property, would pay the tax, and thereby save his claim from forfeiture.

The latter part of section 7, of said act, provides that the tax commissioners shall, after the sale and the payment of the purchase-money, issue a certificate to the purchaser, as evidence of his title, and the last clause of the section declares that such certificate shall only be effected, as evidence of the regularity and validity of the sale, by establishing the fact, that the property sold was not subject to taxation, or that the taxes had been paid previous to the sale, or that the property had been redeemed according to the direction of the act. It is not pretended in this case that the property was not subject to taxation, or that the tax had been paid, or that it had been redeemed in the manner provided for in the law. The certificate of the tax commissioners, therefore, in this case, concludes the plaintiffs from any other enquir'es. It is the muniment of a complete and absolute title to the property in the purchaser Turner. That Congress had the power to declare what effect such a certificate of title should have, your honors are referred to "Blackwell on Tax Titles," pages 79 to the end of chapter III, and the cases cited.

14 For these and various other grounds of error, your petitioner prays a writ of error and supersedeas to said judgment.

Respectfully submitted.

THE PETITIONER,
By his Counsel.

I, Francis L. Smith, an attorney practicing in the district courts of appeals, in Virginia, am of opinion, that the judgment of the circuit court of Alexandria, referred to in the foregoing petition is erroneous, and ought to be reviewed.

Respectfully submitted.

FRANCIS L. SMITH.

Supersedeas awarded. Bond with surety to be given in the penalty of four hundred dollars, conditioned as the law directs.

R. C. L. MONCURE.

SEPTEMBER 26, 1867.

To the CLERK of the district court, held at Fredericksburg.

15 District court of appeals, Fredericksburg, Va.

R. M. & J. M. SMITH
vs.
D. TURNER.

VIRGINIA:

Pleas before the judge of the circuit court of the county of Alexandria, on the 28th day of June, in the year 1867.

Be it remembered that heretofore, to wit, at a county court held for said county of Alexandria, on the 2d day of April, 1867, the sheriff of said county returned to said court, a warrant of distress for rent, and a forthcoming bond taken in pursuance thereof, which warrant, with the returns thereon made, and the said bond, are in the words and figures following, to wit:

DISTRESS WARRANT.

David Turner to Richard M. & James M. Smith, Dr.

Nov. 19, 1866. To rent from Nov. 19, 1861, to date, 5 years, at $224 00 per annum..... $1,120 00

ALBEMARLE COUNTY, *to wit:*

This day James M. Smith made oath before me, James Lobban, a justice of said county, that he verily believes that David Turner, the tenant of him, the said affiant, and of Richard M. Smith, is justly indebted to them in the sum of one thousand one hundred and twenty dollars, for rent reserved upon contract, for a certain messuage and tenement, situate in the county of Alexandria, Virginia.

Given under my hand this 13th day of February, 1867.

JAMES LOBBAN, *J. P.*

[Rev. stamp 5-c.]

16 ALEXANDRIA COUNTY:

To the sheriff of the said county:

Whereas James M. Smith hath, the 13th February, 1867, made oath before James Lobban, a justice of the county of Albemarle, Va., that he verily believes that David Turner, tenant of said James M. Smith and Richard M. Smith, is justly indebted to them in the sum of one thousand one hundred and twenty dollars, for rent reserved upon contract for a certain messuage and tenement, situated in the said county:

These are therefore, in the name of the Commonwealth, to require you forthwith to distrain so much of the goods and chattels of the said David Turner, in and upon the said messuage and tenement, or which have been removed therefrom not more than thirty days, as shall be sufficient to satisfy the rent due and in arrear as aforesaid and the cost of distress; and for your so doing this shall be your authority.

Given under my hand this 15th day of February, 1867.

SAM'L BEACH, *J. P.* [L. S.]

[Rev. stamp 50c.]

MARCH 16, 1867.

Executed by attaching the following articles, the property of David Turner, to wit: One piano, two sofas, one book-case, two carpets, two looking-glasses, one stove, one centre-table, and one marble-top table.

Forthcoming bond given and property released.

J. M. STEWART, *Sheriff.*

APRIL 2D, 1867.

The parties executing this bond having failed to comply with the conditions, it is herewith returned with the distress-warrant to the clerk's office of the county of Alexandria.

J. M. STEWART, *Sheriff.*

Forthcoming bond.

Know all men by these presents that we, David Turner and Samuel O. Bagot, are held and firmly bound unto Richard M. Smith and James M. Smith, in the sum of four hundred dollars, to the payment whereof well and truly to be made to the said Richard M. Smith and James M. Smith, their executors and administrators, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by
17 these presents, sealed with our seals and dated this 16th day of February, 1867.

The condition of the above obligation is such that, whereas the above-named Richard M. Smith and James M. Smith have obtained from Samuel Beach, a justice for Alexandria County, a warrant of distress, for rent, against the goods and chattels of the above-bound David Turner, directed to the sheriff of said county, which warrant, with costs, amounts to $1,152 55; and whereas the sheriff aforesaid, by virtue of said warrant, has taken the following property, to wit: One piano, two sofas, one book-case, two carpets, two looking-glasses, one stove, one centre-table, one marble-top table, belonging to said David Turner, to satisfy said warrant and costs; and the said David Turner, desiring to keep the said property in his possession until the day of sale thereof, executes this his bond, with Samuel O. Bagot as his surety, for the forthcoming and delivery thereof on the day and at the place of sale.

Now, therefore, if the above-bound David Turner and Samuel O. Bagot, or either of them, do and shall deliver the said property to the said sheriff, at the court-house of said county, on the first day of the next April term of the county court for said county, then and there to be sold to satisfy said warrant in favor of the said Richard M. Smith and James M. Smith, then this obligation to be void; otherwise to remain in full force and virtue.

DAVID TURNER. [L. S.]
SAM'L O. BAGOT. [L. S.]

The parties executing this bond having failed to comply with the conditions, it is herewith returned, with the distress-warrant, to the clerk's office of the county of Alexandria.

April 2d, 1867.

J. M. STEWART, *Sheriff.*

Cause removed to circuit court.

Whereupon came the parties, by their attorneys, and the defendant, waiving legal notice, it was, by consent of parties, ordered that this cause be removed to the circuit court for this county for trial.

18 And at another day, to wit, at a circuit court continued and held for said county of Alexandria on the 31st day of May, 1867—

J. M. & R. M. SMITH, PLAINTIFFS,
vs.
DAVID TURNER, DEFENDANT.

On a motion on a forthcoming bond.

This day came the parties, by their attorneys, and this cause having been removed from the court *court* for this county to this court for trial, is ordered to be docketed, and the defendant pleaded nil debet—no rent in arrear—and non demisit, to which pleas the plaintiffs replied generally; and it appearing to the court proper that a jury be impan'elled to try the issue, thereupon came a jury, to wit: John T. Baggott, Harrison Kirk, W. H. Faulkner, W. E. Atwell, James Hammersly, George Sullivan, John Naylor, W'm Goodrich, W'm P. Baxter, W. T. Herrick, W'm Jenkins, and P. G. Henderson, who, being selected, tried, and sworn the truth to speak upon the issue joined, upon their oath returned a verdict in these words: "We, the jury, on the issue joined, find the following facts: That William H. Hannon, being seized in fee and possessed of a tenement and lot of ground in the town of Alexandria, situated on the east side of Royal street, 120 feet south of King street, and on the south side of an alley 20 feet wide, binding on Royal street 31 feet, and 123 feet 5 inches deep, and in controversy in the suit, did, by deed of the 19th day of November, 1819, with his wife, grant to William S. Moore a yearly rent of $224, payable on the 19th day of November and May, in each year, forever, to be issuing out of, and charged upon, the said tenement and lot, with right of distress and reëntry, in the following words and figures, to wit:

Deed of Hannon and wife to Moore.

This indenture, made this nineteenth day of November, in the year

one thousand eight hundred and nineteen, between William H. Hannon and Mary, his wife, of the town of Alexandria, in the District of Columbia, of the one part, and William S. Moore, of the town of Baltimore, in the State of Maryland, of the other part, witnesses:

That the said William H. Hannon and Mary, his wife, for and
19 in consideration of the sum of twenty-eight hundred dollars to
the said William H. Hannon, by the said William S. Moore in hand paid, the receipt whereof is hereby acknowledged, have granted, bargained, and sold, and do by these presents grant, bargain, and sell to the said William S. Moore one certain annuity or yearly rent of two hundred and twenty-four dollars, payable in equal half-yearly instalments on the nineteenth day of November and May next ensuing, the date hereof, and on the same days in every year forever hereafter, to be issuing out of, and charged upon, a certain piece or parcel of ground, with the buildings thereon erected, situated on the east side of Royal street, and to the southward of King street, in the said town of Alexandria, and bounded as follows, to wit: Beginning upon Royal street one hundred and twenty feet to the southward of King street, and up the south line of a twenty feet alley, running thence eastwardly with the line of said alley and parallel to King street one hundred and twenty-three feet five inches; thence southwardly with the line parallel to Royal street, and with the line of that lot or half acre of ground described in the plan of the town of Alexandria by the number fifty-four, thirty-one feet to the line of the ground granted by Alexander Smith to Joseph Angle; thence with the line of that ground and parallel to King street westwardly one hundred and *and* twenty-three feet five inches to Royal street; thence binding therewith northwardly thirty-one feet to the beginning; which lot of ground, with the buildings thereon, was conveyed to the said William H. Hannon by deed from Ephraim Gilman, bearing date August the twenty-third, eighteen hundred and seventeen; to hold the said annuity or rent to the said William S. Moore, his heirs or assigns, to his and their only use forever hereafter; and the said William Hannon, for himself, his heirs, executors, administrators, and assigns, do hereby covenant with the said William S. Moore, his heirs and assigns, that he, the said William H. Hannon, his heirs and assigns, will well and truly satisfy and pay the said rent as it shall fall due to the said William S. Moore, his heirs and assigns, without defalcation, on the days appointed for the payment thereof, in every year forever hereafter, and that, if the said rent shall not be punctually
paid as it shall become due, it shall be lawful for the said William
20 S. Moore, his heirs and assigns, from time to time, on every such
default to enter on the premises charged therewith, and to levy, by distress and sale, of the effects there found the rent in arrear and the costs of such distress and sale, and that, if the said rent shall at any time *shall* remain unpaid for the space of thirty days after the time appointed for the payment thereof, and no subject of distress sufficient to satisfy the same can be found on the premises charged, then it shall be lawful for the said William S. Moore, his heirs and assigns, to enter on the said premises, and from thence to expel and remove the said William H. Hannon, his heirs and assigns, and forever thereafter to hold and occupy the said tenement and lot as the absolute estate of the said William S. Moore, his heirs and assigns, provided, however, that if the said William H. Hannon, his heirs or assigns, shall at any time hereafter pay to the said William S. Moore, his heirs or assigns, the sum of twenty-eight hundred dollars, and all arrears of the rent which shall be then due, and a ratable dividend of the rent for the time which

shall have elapsed between the then next preceding half yearly day and the day of such payment, then this indenture shall become void, and the rent hereby granted cease and determine, and the said William S. Moore, his heirs or assigns, will execute and deliver all deeds necessary for the extinguishment thereof; but nothing herein contained shall be considered as creating any obligation on the said William H. Hannon, his heirs or assigns, to extinguish the said rent under the terms of the above conditions, it being left optional with them to do so, or continue the said rent at their pleasure. And the said William H. Hannon, for himself, his heirs, executors, and administrators, does further covenant with the said William S. Moore, his heirs and assigns, that he, the said William Hannon, is now in his own right, seized in fee simple, in possession of a good and absolute estate in the said lot of ground and tenements thereon, free from condition, charge, or incumbrance, and that he hath full power to charge the same with the rent hereby created, and deliver all further reasonable conveyances which may be necessary more completely to vest in the said William S. Moore, his heirs and assigns, the rent hereby created; and, lastly, that he and his heirs will warrant and defend the said rent to the said William S. Moore, his heirs and assigns, against the claims and demands of all persons whatsoever.

21 In witness whereof the said parties have hereunto set their hands and seals the day and year first above written.

W'M H. HANNON. [SEAL.]
MARY HANNON. [SEAL.]

Sealed and delivered in the presence of—
THOMSON S. MASON, for W. H. H.
ROBERT I. TAYLOR.
D. MINOR.

MEMORANDUM.—The said William S. Moore agrees that the said William H. Hannon, his heirs or assigns, may extinguish one-half of the rent before granted by the payment of fourteen hundred dollars and all arrears.

DISTRICT OF COLUMBIA,
County of Alexandria, sct:

[L. S.] The United States of America to N. S. Wise and Christopher Neale, gentlemen, justices of the said county of Alexandria, greeting:

Whereas William H. Hannon and Mary, his wife, by their certain indenture of grant, bearing date the nineteenth day of November, eighteen hundred and nineteen, have sold and conveyed to William S. Moore the fee-simple estate of one certain annuity or rent of two hundred and twenty-four dollars charged on a tenement and lot of ground on the east side of Royal street, between King and Prince streets, with the appurtenances, situate, lying, and being in the said county of Alexandria; and whereas the said Mary cannot conveniently travel to our United States circuit court of the District of Columbia for the county of Alexandria to make acknowledgment of the said conveyance:

Therefore we do give unto you, or any two or more of you, power to receive the acknowledgment which the said Mary shall be willing to make, before you, of the conveyance aforesaid, contained in the said indenture, which is hereunto annexed. And we do therefore desire you, or any two or more of you, personally to go to the said Mary and receive her acknowledgement of the same, and examine her privily and

apart from the said William H. Hannon, her husband, whether she doth the same freely and voluntarily, without his persuasion or threats,
22 and whether she be willing the said indenture, together with this commission, shall be recorded in our said court; and, when you have received her acknowledgment and examined her as aforesaid, that you distinctly and openly certify us thereof in our said court, under your hands and seals, sending then there the said indenture and this writ.

Witness the Hon. William Cranch, chief judge of our said court, this twentieth day of November, eighteen hundred and nineteen.

EDW. J. LEE, *C. C.*

DISTRICT OF COLUMBIA, *to wit:*

To the honorable the United States judges of the circuit court of the district of Columbia for the county of Alexandria:

The subscribers, justices of the peace for the county of Alexandria, do respectfully certify that, under the authority of this commission, we examined Mary, wife of William H. Hannon, therein named, privily and apart from her said husband, respecting her execution of the indenture annexed and within described, which we shewed and explained to her; on which examination she acknowledged that she had willingly, of her own accord, signed and sealed the same, and consented to its being duly recorded.

Certified under our hands and seals, this twenty-fifth day of November, eighteen hundred and nineteen.

N. S. WISE. [SEAL.]
CHRIST. NEAL. [SEAL.]

At an United States circuit court of the District of Columbia, continued and held for the county of Alexandria, the twenty-first day of December, eighteen hundred and nineteen,

This deed from William H. Hannon and Mary, his wife, to William S. Moore, was proved, by the oaths of Thomson F. Mason, Robert I. Taylor, and Daniel Minor, to be the act and deed of the said William H. Hannon, together with a commission and return for the privy examination of Mary Hannon, wife of the said William H., is ordered to be recorded.

Teste: EDW. J. LEE, *C. C.*

A copy.
Teste: J. TACEY, *Clk C. C.*

[Revenue stamp, 5 cts.]

23 That afterwards, by deed of the —— day of ——, the said William S. Moore did convey the said rent, among other things, to Robert I. Taylor, in trust, to secure a large debt, in said deed mentioned, owing by said Moore to Thomas Irwin, together with the rights of distress and reëntry; that the said rent was duly sold by the said Robert I. Taylor, in pursuance of said deed of trust, when Thomas Irwin, jr., became the purchaser thereof, to whom the same, with the rights aforesaid, were conveyed by the said Taylor, trustee, by deed of the 9th day of December, 1830; that the said Thomas Irwin departed this life in January, 1827, having duly made his last will and testament, but in which no particular disposition was made of his claim under the said deed; that the said Tho's Irwin, jr., by deed of 17th February,

1831, conveyed the said rent, with the said rights, to his mother, Elizabeth Irwin, who died seized thereof in the year ——, whereupon it descended to her children, the said Thomas Irwin, jr., Hannah Wilson, James Irwin, Mary Irwin, William H. Irwin, and her grandchildren, James Carey and Thomas I. Carey; and that said James Irwin, by deed of 30th November, 1850, and the said William H. Irwin, by deed of 24th December, 1847, conveyed their interests therein to the other said descendants of their mother; that, by the deed of the 21st of May, 1854, the said Thomas Irwin, jr., Hannah Wilson, Mary Irwin, and said Careys, conveyed the said rent, with especial warranty, to Richard M. Smith and James M. Smith, with "all the right, title, and interest in law or equity which they had or held in the said lot of ground, (namely, the lot of ground charged with the said rent,) derived from any source whatever; also, all incidents and arrears of said rent to the full extent to which they were then entitled to them in any wise;" which said deed is in the following words and figures, to wit:

Deed of Tho's Irwin, jr., et al., to R. M. and J. M. Smith.

"This deed, made the 21st day of March, 1854, between Thomas Irwin, jr., and Ellen, his wife, and James Carey and Susanna B., his wife, of the city of Baltimore, Maryland; Thomas J. Carey and Martha L., his wife, of the State of Pennsylvania; and Hannah Wilson and Mary Irwin, of the city of Alexandria, in the State of Virginia, of the
24 first part, and Richard M. Smith and James M. Smith, of said city of Alexandria, of the second part, witnesseth: That, in consideration of five thousand dollars, the parties of the first part do grant unto the parties of the second part, with special warranty, a certain ground-rent or rent-charge, issuing out of and charged upon a lot of ground, with the buildings thereon erected, situate in said city of Alexandria, on the east side of Royal street and to the southward of King street, and bounded as follows, to wit: Beginning upon Royal street, one hundred and twenty feet to the southward of King street, and upon the south line of a twenty-feet alley, running thence eastwardly with the line of the said alley, and parallel to King street, one hundred and twenty-three feet five inches; thence southwardly with the line parallel to Royal street, thirty-one feet; thence westwardly parallel to King street, one hundred and twenty-three feet five inches, to Royal street; thence, binding th'rewith, northwardly thirty-one feet, to the beginning; which ground-rent amounts to two hundred and twenty-four dollars yearly, payable in equal half-yearly payments on the 19th day of November and May in each year, commencing on the 19th day of November, 1819, all which may be seen by reference to the deed creating the rent-charge, from William Hannon and wife to William S. Moore, recorded in Alexandria County court, in liber K, No. 2, page 52. And the parties of the first part do also grant unto the parties of the second part all the right, title, and interest, in law or equity, which they have or hold in and to the lot of ground aforesaid, derived from any source whatever. And they do also assign said rent-charge, with all its incidents, and all arrearages of rent due on it, to said parties of the second part, to the full extent to which they are now entitled to them in any wise. The above-granted property was devised to the grantors above, with William H. and James Irwin, by Elizabeth Irwin, by her will, recorded in Alexandria County court, the said William H. and James having relinquished their title under said will to the above-granted property to the above-named grantors, by deeds recorded in

said court, the one in liber I, No. 3, page 340, the other in liber M, No. 3, page 81.

25 Witness the following signatures and seals:

THOMAS IRWIN, JR.	[SEAL.]
ELLEN IRWIN.	[SEAL.]
JAMES CAREY.	[SEAL.]
SUSANNA B. CAREY.	[SEAL.]
THOMAS I. CAREY.	[SEAL.]
MARTHA L. CAREY.	[SEAL.]
HANNAH WILSON.	[SEAL.]
MARY IRWIN.	[SEAL.]

CITY OF BALTIMORE, *State of Maryland:*

I, Edward I. Peters, a justice of the peace in and for the city aforesaid, in said State, hereby certify, that James Carey, whose name is signed to the writing above, bearing date on the 21st day of March, 1854, has acknowledged the same before me in my city aforesaid.

Given under my hand this 25th day of April, 1854.

EDW. I. PETERS.

CITY OF BALTIMORE, *State of Maryland:*

We, Edw. I. Peters and W'm N. Brice, justices of the peace for the city aforesaid, in said State, do certify that Ellen Irwin, the wife of Thomas Irwin, jr., and Susanna B. Carey, the wife of James Carey, whose names are signed to the writing above, bearing date on the 21st day of March, 1854, personally appeared before us in our city aforesaid, and being examined by us, privily and apart from their husbands, and having the writing aforesaid fully explained to them, they, the said Ellen Irwin and Susanna B. Carey, acknowledge the said writing to be their act and deed, and declared that they had willingly executed the same and did not wish to retract it.

Given under our hands this 25th day of April, 1854.

W'M N. BRICE.
EDW. J. PETERS.

STATE OF PENNSYLVANIA,
County of Delaware, to wit:

I, J. P. Worrall, a justice of the peace in and for the county aforesaid, in said State, do certify that Thomas I. Carey, whose name
26 is signed to the writing above, bearing date on the 21st day of March, 1854, has acknowledged the same before me in my county aforesaid.

Given under my hand this 27th day of April, 1854.

J. P. WORRALL, *J. P.*

STATE OF MARYLAND,
City of Baltimore, to wit:

We, Edw. I. Peters, and W'm N. Brice, justices of the peace in and for the city aforesaid, in said State, do certify that Martha L. Carey, the wife of Thomas I. Carey, whose namee are signed to the writing above, bearing date on the 21st day of March, 1854, personally appeared before us, in the city aforesaid, and being examined by us privily and apart from her husband, and having the writing aforesaid fully explained to her, she, the said Martha L. Carey, acknowledged the said

writing to be her act and declared that she had willingly executed the same and does not wish to retract it.

Given under our hands this 25th day of April, 1854.

W'M N. BRICE.
EDW. J. PETERS.

CITY OF ALEXANDRIA,
State of Virginia, sct:

Personally appeared before me a justice of the peace in and for the city of Alexandria aforesaid, Thomas Irwin, jr., of the city of Baltimore, in the State of Maryland, and Hannah Wilson and Mary Irwin, of the city of Alexandria, and I do hereby certify that those three persons have acknowledged their several signatures, attached to the annexed writing, to be their acts and deeds, and they have acknowledged the same before me, in my city, aforesaid.

As witness my hand, this 24th day of April, one thousand eight hundred and fifty-four.

DANIEL CAWOOD, *J. P.*

Alexandria County court, August 11th, 1854.

This deed was presented to the court, and having been acknowledged before justices, ordered to be recorded.

Teste:

B. H. BERRY, *Clerk.*

That the said R. M. and J. M. Smith, continued and were seized and possessed of the property so conveyed to them, and on or about the 24th day of May, 1861, abandoned their residence in Alexandria
27 on the commencement of the civil war, and went within the military lines of the Confederate States. That, on the first day of March, 1864, the said property was assessed at $3,500, and was sold under and by virtue of the act of Congress, "for the collection of direct taxes in insurrectionary districts, within the United States, and for other purposes," to David Turner, who fully complied with the terms of said sale, and paid the purchase-money therefor in the mode prescribed by law, and received from the commissioners, who were empowered by the said act to make such sale, a certificate thereof, in conformity with the said sale and the said act, which certificate is in the words and figures following, to wit:

Tax sale certificate.—U. S. tax commissioners to Turner.

"No. 504.
"UNITED STATES OF AMERICA.
"Tax sale certificate No. 138.

"This is to certify that, at a sale of lands for unpaid taxes, under and by virtue of an act entitled 'An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes,' held pursuant to notice, at Alexandria, in the State of Virginia, on the 1st day of March, A. D. 1864, the tract or parcel of land hereinafter described, situate in the city of Alexandria, State of Virginia, and described as follows, to wit: House on Royal street, between King and Prince streets, said to have belonged to R. M. and J. M. Smith, and charged to them on the land-book of the State aforesaid, for the year 1860, and valued on said book at three thousand five hundred dollars,

was sold and struck off to David Turner, for the sum of seventeen hundred and fifty dollars and cents, he being the highest bidder, and that being the highest sum bidden for the same; the receipt of which said sum, in full, is hereby acknowledged and confessed.

"Given under our hands, at Alexandria, this 1st day of March, A. D. 1864.

"JOHN HAWXHURST,
"GILLET F. WATSON,
"A. LAWRENCE FOSTER,
"*Commissioners.*"

28 That, under and by virtue of his said purchase, and the said certificate, the said David Turner entered upon the possession of the said lot of ground, and has ever since been possessed thereof. That, on the 24th of August, 1827, the said William S. Moore, being then in possession of the said tenement and lot of ground, demised the same to James Green, for the term of ten years, then next ensuing for the yearly rent of $240, and that the said Green entered upon the premises under and by virtue of the said demise, and continued in possession thereof during the said term, paying rent therefor to the said Moore, to the said Thomas Irwin, jr., and the said Elizabeth Irwin. That the said William H. Hannon died insolvent, in or about the year 1821, and that thereupon or shortly thereafter the said Moore took possession of the said premises, and continued in possession thereof until the said sale and conveyance by said Robert I. Taylor, as aforesaid, and that thereafter and thereupon the said Thomas Irwin, jr., took and continued in possession thereof until his said conveyance to the said Elizabeth Irwin, who thereupon took and remained in possession thereof until her decease, whereupon her said children and grandchildren took possession, and held and possessed the same until the conveyance aforesaid to the said Richard M. Smith and James M. Smith, who remained possessed thereof until the said sale to the said David Turner, who thereupon became possessed of the same, and still continues possessed thereof; that the said several parties so being possessed, did occupy and enjoy the same, and receive to their own use the rents and profits thereof. That the said house and lot of ground were charged and assessed upon the assessor's books of the corporation of Alexandria, as follows: For the years 1827, 1828, 1829, 1830, 1831, to W'm H. Hannon, or Hamond, or Hammond; for the year 1832 to Irwins; for the years 1833, 1834, to James Irwin; for the years 1835 to 1854, both inclusive, to Elizabeth Irwin; for the years 1855 to 1864, to R. M. Smith and brother, and for 1864 and subsequent years, to David Turner, and upon the books of the assessors of the State of Virginia, called the land-book for Alexandria County, as follows: From the year 1847 to the year 1853, both inclusive, to Elizabeth Irwin; from the year 1854 to the year 1864, both inclusive, to R. M. and J. M. Smith, and from 1864 to 1867, both inclusive, to David

29 Turner, and that the taxes assessed and charged upon the said property by the said corporation, and the State as aforesaid, were paid by the parties so assessed; and we further find that W'm S. Moore was a non-resident of the State of Virginia, that he departed this life sometime between 1830 and 1835. If, upon the foregoing facts, the law is for the plaintiffs, we find for them the sum of $200, the amount of rent and costs mentioned in the forthcoming bond; if, however, the law be for the defendant, we find for the defendant

JA'S F. HAMMERSLY,
Foreman.

Agreement that judgment be entered in vacation.

And at another day, to wit, at a circuit court, continued and held for said county of Alexandria, on the 1st day of June, 1867, this day came the parties, by their attorneys, and it is agreed that judgment upon the special verdict may be entered in this cause in vacation, the same to have effect as if rendered at this term.

Judgment.

And now, at this day, to wit, on the day and year first herein mentioned, to wit, the 28th day of June, in the year 1867, in the clerk's office of the said circuit court, the matters of law arising upon the special verdict in this cause having been maturely considered by the court, it seems to the court that the law is for the plaintiffs. Therefore it is considered by the court that the plaintiffs recover against the defendant four hundred dollars, the penalty of the bond in this cause, and their costs by them in this behalf expended.

But this judgment is to be discharged by the payment of two hundred dollars and the costs.

Which judgment, by consent of parties of record, is this day recorded in vacation, having the same legal force and effect as if the same had been recorded in the orders and proceedings of the last term of said court.

Teste:

JEFFERSON TACEY, *Clerk.*

30 The following is a copy of the opinion of the judge in this cause:

Opinion of judge.

R. M. & J. M. SMITH
vs.
DAVID TURNER.

This is a case not free from difficulty, involving questions not familiar to Virginia courts.

The special verdict finds that the property out of which this controversy arises is situate in Alexandria, Virginia, and of course subject to the direct tax imposed by the act of Congress passed in 1861, and that under the act of June 7, 1862, providing for the collection of direct taxes in insurrectionary districts, &c., it was duly sold by the commissioners appointed under said act, and purchased by the defendant, who, having fully complied with the terms of sale, received the certificate of purchase required by said act, and thereupon entered into, and has held, and continues to hold the possession, claiming title thereto by virtue of said purchase and the certificate of title, as provided for by said act. No question is made as to the validity of the sale; and but one question, affecting the claim of the defendant to the said property, under the sale, arises upon the verdict.

How far this sale, under the title acquired thereby, operates to vest in the defendant "a fee-simple to the property, free and discharged from all prior liens, incumbrances, right, title, and claim whatsoever?"

Upon the part of the defendant it is claimed that, by the 4th section of the act of 1862, the title to each parcel of land upon which the tax

was not paid, as required by the said act, became forfeited to the United States, and that, upon a sale, the absolute estate, discharged of all incumbrances of whatever kind existing thereupon, is vested in the purchaser. I do not think so. The forfeiture to the United States contemplated by the act is intended only to provide that the power of sale should attach for the amount of the lien for the unpaid taxes charged thereupon, and did not intend to vest the absolute estate. The reasons for this view I have heretofore given in a written opinion in the case of Cazenove vs. Portner & Recker.

31 But, however this may be, I do not think it can operate to divest an estate of inheritance which may have been carved out of it as an annuity or rent-charge, if it shall be found to exist. The verdict fines that W'm H. Hannon, being possessed, in fee, of a tenement and lot, did, by deed of November 19th, 1819, grant unto W'm S. Moore a yearly rent of $224, payable as therein stipulated forever, to be issuing out of and charged upon the said tenement and lot, with the right of distress and reëntry; and if the said rent were not paid as therein provided, that it should be lawful for the said Moore, his heirs and assigns, to enter on the said premises, and from thence to expel and remove the said Hannon, his heirs and assigns, and forever thereafter to hold and occupy the said tenement and lot as the absolute estate of the said Moore, his heirs and assigns. It also finds that the said W'm H. Hannon died insolvent in or about the year 1821, and that thereupon, or shortly thereafter, the said Moore took possession of the said premises, and continued in possession until sold by R. I. Taylor under a deed of trust, which will be hereafter noticed. The verdict is silent as to the manner Moore acquired possession of the tenement and lot; and until the revisal of 1849, there was no statute providing for reëntry for nonpayment of rent, so that all such proceedings anterior thereto must be governed by the common law. For the provisions relative to the exercise of this right, see Conner vs. Bradley, 1 Howard, 211.

It does not appear that any of the requisites provided by the common law for reëntry were complied with, but the presumption might arise, from the fact of his occupancy, uncontested and undisputed, that he was properly possessed thereof. But it is further found that, whilst thus possessed, *that* he, on the 15th July, 1825, conveyed to R. I. Taylor, in trust, among other things, to secure a large debt due to Tho's Irwin, the said rent merely eo nomine, not claiming to be entitled to any further or greater interest therein, that he thus conveyed the benefit of all covenants and conditions in the deed from Hannon to him for the security of the payment of the charge, and nothing more. Here, then, was the declaration, upon the part of Moore, of the interest he claimed in the premises, and this interest, with the like benefit of all conditions and covenants, has been transmitted by regular assignment to the

32 present plaintiffs.

This being the evidence of their possession and the declaration of their title, the said Moore and those claiming under or through him are estopped from asserting any greater interest in the premises. No such claim has been asserted, unless, indeed, the grant by the grantors of the plaintiffs of all other right which they have or hold in law or equity to the said lot, derived from any source, can be so construed. This, however, in my opinion, imports no claim, and is not evidence of any interest beyond that expressly conveyed.

What, then, are the rights of the respective parties? The fee-simple right to the property, subject to the rent-charge, at the date of the sale, for taxes due thereupon, was in Hannon's heirs, and, so far as the pur-

poses of this suit are concerned, may be regarded as vested in the purchaser. The rent-charge, which is defined to be an estate of inheritance, being for the security for the payment of the rent, and waiting upon the rents, with the benefit of the conditions and covenants contained in the deed creating the charge, have been regularly and duly assigned to the plaintiffs, and that by the grant the penalty and the advantage has well passed. (See Scott vs. Lunt's admin'r's, 7 Peters.) This rent-charge is, therefore, unaffected by the sale, and I am of the opinion that the plaintiffs, as assignees of the rent, as well as the right of distress and reëntry, have legal title both to the rent and the attendant remedies.

Judgment for plaintiffs.

H. W. T.

The following deeds are inserted by consent of parties:

Deed between William S. Moore and Robert I. Taylor.

This indenture, made this 15th day of July, in the year one thousand eight hundred and twenty-five, between William S. Moore and Catharine, his wife, of Baltimore, in the State of Maryland, of the one part, and Robert I. Taylor, of Alexandria, in the District of Columbia, of the other part. Whereas the said William S. Moore has proposed to establish a credit with the said Thomas Irwin, to be carried to such extent, and to continue for such length of time, as the parties may think proper, in the course of which the said Thomas Irwin may come under ac-
33 ceptances, issue papers, and incur responsibilities for the accommodation of the said William S. Moore, against all which the latter has offered to give indemnity:

Now this indenture witnesses that the said William S. Moore and Catharine, his wife, to create the proposed indemnity, and in consideration of the sum of one dollar to the said William S. Moore by the said Robert I. Taylor, in hand paid, of which he does hereby acknowledge the receipt, have granted, bargained, and sold, assigned and transferred, and do, by these presents, grant, bargain, and sell, assign and transfer to the said Robert I. Taylor one individed moiety of the tavern lot of ground and improvements, commonly called the City Tavern, situated in the town of Alexandria, on the south side of Cameron street and on the west side of Royal street, and bounded as follows: Beginning at the intersection of said streets; thence south on Royal street, 80 feet; then west parallel to Cameron street, 125 feet 5½ inches; then south parallel to Royal street, 21 feet 6½ inches; then west parallel to Cameron street, 72 feet; then north parallel to Royal street, 101 feet 6½ inches to Cameron street; then east on Cameron street, 197 feet 5½ inches to the beginning, with the use of a nine feet alley on the south side of said lot, and of all other alleys appurtenant thereto, and of all privileges and advantages to the said lot belonging or in any manner appertaining, which said tavern lot of ground, improvements, and appurtenances were conveyed to the said Thomas Irwin and William S. Moore by deed of the 31st January, 1815, from John Wise and others; also one annuity or rent of two hundred and twenty-four dollars per annum payable on the 19th day of May and 19th of November in every year, charged on a three-story brick tenement and lot of ground on the east side of Royal street, in the said town of Alexandria, bounded as follows: Beginning on Royal street, 120 feet to the south of King street, on the south line of a 20-feet alley; then east on the alley, 123 feet 5

inches; then south parallel to Royal street, 31 feet; west parallel to the said alley to Royal street; north on Royal street to the beginning, which annuity or rent was granted to the said William S. Moore by deed from W. H. Hannon and wife, dated the 19th day of November, 1819, together with the benefit of all covenants and conditions in said deed contained, for the payment of the said rent, for levying the same by distress, and for reëntry for non-payment, if no sufficient subject of distress can be found.

34 To have and to hold all and singular the premises hereinbefore described and intended to be conveyed to the said Robert I. Taylor, his heirs and assigns, to his and their only use forever; In trust, however, for the following purposes, that is to say, to permit the said William S. Moore to receive the rents and profits, without account, until a sale become necessary under the terms of this deed; and if the said William S. Moore, his heirs, executors, or administrators, shall, at any time hereafter, when required, fail to provide funds for the payment of all bills, notes, and other securities, accepted, drawn, endorsed, or entered into by the said Thomas Irwin, for his accommodation, or shall fail to refund, with interest, all advances which shall be made by the said Thomas, for him or on his account, or shall fail to pay any balance which shall be due to him, the said Thomas, from said William S. Moore, on account of any dealings or transactions whatever:

Then that the said Robert I. Taylor, or his heirs, shall, on the request of the said Thomas Irwin or his representatives, proceed to sell at public auction for cash, or on such credit as the parties concerned may direct, after giving one month's notice of the time and place of sale in some newspaper published in Alexandria, the said undivided moiety of the said tavern and lot, or the said annuity, or both, as the case may require, and from the money which may arise from such sale, after defraying all reasonable costs and charges attending it, shall refund to the said Thomas Irwin, or to his representatives, all sums of money by him or them advanced for or on account of the said William S. Moore, and all money due in any manner from the said William S. Moore, or his representatives to the said Thomas Irwin, or his representatives, for or on account of any dealings or transactions between the said William and the said Thomas, and shall proceed to satisfy and discharge all outstandings bonds, bills, notes, contracts, and securities of every description made, drawn, accepted, endorsed, or entered into by the said Thomas for or on account of the said William. And if, after the debts so due to the said Thomas or his representatives, shall, with the legal interest thereon, have been paid, and the said Thomas and his representatives shall have been fully exonerated from all responsibility for,

35 or on account of the said William, any balance of money arising from such sales shall remain, or any part of the property above described shall be unsold, then the said Robert I. Taylor or his heirs shall pay over such balance of money, and reconvey such unsold property to the said William S. Moore, his heirs, or assigns.

Provided always, and on this condition, that, if the said William S. Moore, his heirs or assigns, shall, at any time before sale actually made, pay to the said Thomas Irwin or his representatives, all sums of money with interest at that time due from the said William or his representatives to the said Thomas or his representatives, arising from transactions between the said William and Thomas, and shall fully and effectually release, exonerate, and discharge the said Thomas and his representatives from all pecuniary responsibilities incurred by the said

Thomas for or on account of the said William, and shall pay all reasonable charges and expenses incurred in the execution of the trusts hereby created, and shall, moreover, deliver to the said Thomas Irwin a notice in writing that no further credit or accommodation will be required under the security herein provided, then this indenture shall become void, and all the estate hereby conveyed shall cease and determine.

And the said William S. Moore, for himself, his heirs, executors, and administrators does hereby covenant with the said Robert I. Taylor, his heirs and assigns, that he, the said William S. Moore, now is seized in possession in fee of a good and perfect estate in the said undivided moiety of the said tavern and lot, and in and to the said annuity or rent, free from all charges, incumbrances and conditions, except such as are mentioned in the deed before referred to under which the said William S. Moore holds the same; and further, that he the said William S. Moore and his heirs will, at the request and at the costs of the said Robert I. Taylor, his heirs or assigns, execute and deliver all such further and other reasonable conveyances as may be necessary more completely to vest in the said Robert I. Taylor, his heirs and assigns, the title to the said undivided moiety of the said tavern and lot, and to the said annuity or rent.

And, lastly, that the said William S. Moore, and his heirs, the
36 said undivided moiety of the said tavern and lot, and the said annuity or rent to the said Robert I. Taylor, his heirs and assigns, shall and will warrant and forever defend against the claims and demands of all persons whatever.

And the said Robert I. Taylor, for himself and his heirs, does hereby covenant with the said William S. Moore and Thomas Irwin severally, and their executors and administrators, faithfully to execute and carry into full effect the trusts hereby declared.

In witness whereof the parties to this indenture have hereto set their hands and seals the day and year first above written.

WILLIAM S. MOORE. [SEAL.]
CATHARINE MOORE. [SEAL.]

Sealed and delivered in presence of—
THO. BAILEY,
W'M A. SHAFFER.

DISTRICT OF COLUMBIA,
Alexandria County, sct:

[L. S.] The United States of America to Thom's Bailey and W'm A. Shaffer, gentlemen, justices of the city of Baltimore, greeting:

Whereas William S. Moore and Catharine his wife, by certain indenture of bargain or sale, bearing date the 15th day of July, 1825, have sold and conveyed unto Robert I. Taylor the fee simple estate of one undivided moiety of a tavern called the City Tavern, and of the lot thereto belonging, of one annuity or rent of $224 per annum charged on a lot on the east side of Royal street, with the appurtenances, situate, lying, and being in the said county of Alexandria; and whereas the said Catharine cannot conveniently travel to our United States circuit court of the District of Columbia, for the county of Alexandria, to make acknowledgment of the said conveyance, therefore we do give unto you, or any two or more of you, power to receive the acknowledgment which the said Catharine shall be willing to make before you of

the conveyance aforesaid, contained in the said indenture, which is hereunto annexed; and we do therefore desire you, or any two or more of you, to go to the said Catharine and receive her acknowledgment of the same, and examine her privily and apart from the said Wil-
37 liam S. Moore, her husband, whether she doth the same freely and voluntarily, without his persuasion or threats, and whether she be willing the said indenture, together with this commission, shall be recorded in our said court, and when you have received her acknowledgment, and examined her as aforesaid, that you distinctly and openly certify us thereof in our said court, under your hands and seals, sending there then the said indenture and this writ.

Witness the Hon. William Cranch, chief judge of our said court, this 15th day of July, 1825.

EDM. J. LEE, *C. C.*

STATE OF MARYLAND, *City of Baltimore, sct:*

To the hon. the United States judges of the circuit court of the District of Columbia, for the county of Alexandria: The subscribers, justices of the peace for the city of Baltimore, do respectfully certify that, under the authority of this commission, we examined Catharine, wife of W'm S. Moore, therein named, privily and apart from her said husband, respecting her execution of the indenture annexed and within described, which we shewed and explained to her, on which examination she acknowledged that she had willingly, of her own accord, signed and sealed the same, and consented to its being duly recorded.

Certified under our hands and seals this 18th day of July, 1825.

THO. BAILEY. [SEAL.]
W'M A. SHAFFER. [SEAL.]

STATE OF MARYLAND, *Baltimore County, sct:*

I hereby certify that Thomas Bailey and William A. Shaffer, gentlemen, before whom the foregoing acknowledgment was made and certificate given were, at the time of so doing, two justices of the peace in and for the city of Baltimore, duly commissioned and sworn.

In testimony whereof I have hereunto affixed my hand and the seal of Baltimore County court, this 18th day of July, 1825.

W'M GIBSON,
Clk Baltimore C. C.

MARYLAND, *sct:*

I, Stephenson Archer, chief judge of the sixth judicial district of the State of Maryland, and of Baltimore County court, do hereby certify that the above attestation of William Gibson, clerk of said court, is in due form.

38 Given under my hand this 14th day of October, in the year 1825.

STEPHENSON ARCHER.

BALTIMORE COUNTY, *sct:*

On the 18th day of July, in the year of our Lord 1825, personally appeared before the subscriber, mayor of the city of Baltimore, William S. Moore, party to the within instrument of writing, and acknowledged the same to be his act and deed, according to the true intent and meaning thereof.

In testimony whereof I have hereto subscribed my name, and have

caused the corporation seal of the said city to be hereto annexed, the day and year aforesaid.

JOHN MONTGOMERY,
Mayor of the City of Baltimore.

At an United States circuit court of the District of Columbia, continued and held for the county of Alexandria, the 29th day of November, 1825, this deed from William S. Moore to Robert I. Taylor, having been acknowledged by the said William S. Moore before John Montgomery, mayor of the city of Baltimore, and certified by him under the seal of the said city, the same, together with a commission and return for the privy examination of Catharine Moore, wife of the said William S., with a certificate of William Gibson, clerk of Baltimore County court under the seal of the said court, and the certificate of Stephenson Archer, chief judge of the said court, thereto annexed, is ordered to be recorded.

Teste:

EDM. J. LEE, *C. C.*

A true copy. Teste:

CASSIUS F. LEE, *C. C.*

Deed of Robert I. Taylor, trustee, to Thomas Irwin, jr.

This indenture, made this ninth day of December, in the year one thousand eight hundred and thirty, between Robert I. Taylor, of Alexandria, in the District of Columbia, of the one part, and Thomas Irwin, jun., of Baltimore, in the State of Maryland, of the other part.

Whereas, William S. Moore, formerly of Alexandria, late of Baltimore, aforesaid, for the purpose of establishing a credit with Thomas Irwin, the elder, late of Alexandria, to procure advances of money and other facilities from the said Thomas, did, with Catharine, the wife of the said William, by deed dated the 15th July, 1825, convey to the said Robert I. Taylor, for the indemnification of the said Thomas
39 Irwin, one undivided moiety of the tavern lot of ground, and improvements, commonly called the City Tavern, situate in the town of Alexandria, on the north side of Cameron street, and west of Royal street, and bounded as follows: Beginning at the intersection of said streets; thence south on Royal, eighty feet; then west parallel to Cameron street, one hundred and twenty-five feet five inches and a half; then south parallel Royal street, 21 feet 6 inches and a half; then west parallel to Cameron street, 72 feet; then north parallel to Royal street, 101 feet 6½ inches, to Cameron street; then east on Cameron street, 197 feet 5½ inches to the beginning, with the use of a nine-feet alley on the south side of said lot, and of all other alleys appurtenant thereto, and of all privileges and advantages to the said lot belonging, or in any wise appertaining, which said tavern lot of ground, improvements, and appurtenances were conveyed to the said Thomas Irwin and William S. Moore by deed of the 31st January, 1815, from John Wise and others. Also, one annuity or rent of two hundred and twenty-four dollars per annum, payable on the 19th day of May and 19th of November in every year, charged on a three-story brick tenement and lot of ground on the east side of Royal street in the said town of Alexandria, bounded as follows: Beginning on Royal street, 120 feet to the south of King street, on the south line of a 20-feet alley; then east on the alley, 123 feet 5 inches; then south parallel to Royal street, 31 feet; west parallel to the said alley to Royal street; north on Royal street to the

beginning; which annuity or rent was granted to the said William S. Moore by deed from W. H. Hannon and wife, dated the 19th day of November, 1819, together with the benefit of all covenants and conditions in said deed contained for the payment of the said rent, for levying the same by distress, and for reëntry for non-payment, if no sufficient subject of distress can be found.

To hold to the said Robert I. Taylor, his heirs and assigns, to his and their only use forever. In trust, however, for the following purposes, that is to say, to permit the said W'm S. Moore to receive the rents and profits, without account, until a sale should become necessary under the terms of said deed; and if the said W'm S. Moore, his heirs, executors, or administrators should, at any time hereafter, fail to provide funds when required, for the payment of all bills, notes, and other se-
40 curities, accepted, drawn, endorsed, or entered into by the said Thomas Irwin, for his accommodation, or should fail to refund, with interest, all advances which should be made by the said Thomas, for him or on his account, or should fail to pay any balance which should be due to the said Thomas Irwin from him the said W'm S. Moore, on account of any dealings or transactions whatever:

Then that the said Robert I. Taylor or his heirs should, on the request of the said Thomas Irwin or his representatives, proceed to sell at public auction, for cash or on such credit as the parties concerned might direct, after giving one month's notice of the time and place of sale in some newspaper published in Alexandria, the said undivided moiety of the said tavern and lot, or the said annuity, or both, as the case may require, and from the money which might arise from such sale, after defraying all reasonable costs and charges attending it, should refund to the said Thomas Irwin or to his representatives all sums of money by him or them advanced for or on account of the said William S. Moore, and all money due in any manner from the said William S. Moore or his representatives for or on account of any dealings or transactions between the said Thomas and the said William, and should proceed to satisfy all outstanding bonds, bills, notes, contracts, and securities of every description made, drawn, accepted, endorsed, or entered into by the said Thomas for or on account of the said William. And if, after the debts so due to the said Thomas or his representatives, with legal interest thereon, should have been fully paid, and the said Thomas and his reprentatives should have been fully exonerated from all responsibility for or on account of the said William S. Moore, and any balance or money arising from such sale should remain, or any part of the property above described should be unsold, then the said Robert I. Taylor or his heirs were required to pay over such balance of money, and to reconvey such unsold property to the said William S. Moore, his heirs and assigns.

And whereas, on the first day of January, 1837, the bond of the said William to the said Thomas for the sum of three thousand one hundred and eleven dollars sixty-nine cents, for money advanced under the said deed before mentioned, became due, and on the 9th day of May,
41 in the same year, the said Thomas Irwin, jun., as executor of the said Thomas Irwin, the elder, then deceased, paid to John McKim, jun., on the bill on the said William in his favor, drawn on the said Thomas Irwin the elder, and by him accepted in his lifetime, for the said William's accommodation, the sum of three thousand dollars; and on the 16th day of the same month the said Thomas Irwin, jun., as executor as aforesaid, paid to the said John McKim, jun., the further sum of three thousand dollars on the said William's bill in his favor, drawn

on the said Thomas Irwin, the elder, and by him accepted in his lifetime, for the said William's accommodation, the further sum of three thousand dollars. And

Whereas the said William afterwards, that is to say, on or about the day of September last, departed this life, leaving due to the said Thomas Irwin, jun., as executor of the said Thomas Irwin, the sum of eight thousand and sixty-two dollars and twenty seven cents, exclusively of interest, for and on account of the said bond and advances aforesaid; and that the said William having in his lifetime always failed when required to pay off the said bond and advances, and having departed this life insolvent, no administration was taken out on his estate; and the said Robert I. Taylor having been required by the said Thomas Irwin, jun., as executor of the said Thomas Irwin, to execute the trusts aforesaid by a sale of the property so to him conveyed, on the following terms, that is to say, one-third of the purchase-money to be paid in hand, the residue in two equal instalments of six and nine months, with interest from the day of sale; and the said Robert I. Taylor having appointed the said sale to be made at the City Tavern, at 12 o'clock, noon, on Saturday the 27th of November last, and having given one month's notice by advertisement in the Phenix Gazette, a newspaper published in Alexandria as aforesaid, of the time, place, and terms of sale of the said property so conveyed, did, at the time and place and on the terms so appointed, offer for sale at public auction the said undivided moiety of the said City Tavern lot of ground and improvements, with the use of the nine-feet alley before mentioned, and of all other alleys appurtenant thereto, and all privileges and advantages to the said tavern and lot belonging, at which time the same were struck off to the said
42 Thomas Irwin, jun., at the sum of five thousand and seventy-five dollars, being the highest bid made for them; and the said sum of money being insufficient to satisfy the claims of the said Thomas Irwin, jun., the said Robert I. Taylor immediately proceeded to offer, at public auction, the said annuity or rent before mentioned, when the same was struck off to the said Thomas Irwin, jun., at the sum of one thousand and twenty dollars, being the highest bid made for it.

Now this indenture witnesses that the said Robert I. Taylor, in execution of the trusts aforesaid, and in consideration of the said sum of five thousand and seventy-five dollars, and one thousand and twenty dollars to him paid by the said Thomas Irwin, jun., of which the receipt is hereby acknowledged, does by these presents grant, bargain, and sell, assign, and set over to the said Thomas Irwin, jun., the said undivided moiety of the said City Tavern lot of ground, buildings, and improvements, with all the rights of way and other appurtenances thereto; and the said annuity or rent of $224, with the benefit of all covenants, conditions, and provisions in the said deed from William H. Hannon and wife to the said William S. Moore, contained, for securing the payment of the said rent, and for entry for non-payment thereof, to hold to the said Thomas Irwin, jun., his heirs and assigns, to their only use for ever.

In witness whereof, the said Robert I. Taylor, trustee as aforesaid, has hereto set his hand and seal the day and year first above written.

R. I TAYLOR. [SEAL.]

Sealed and delivered in presence of—

PHINEAS JANNEY.
W'M H. IRWIN.
A. C. THOMPSON.
A. P. GILPIN.

At an United States circuit court of the District of Columbia, continued and held for the country of Alexandria, the 12th day of April, 1831, Robert I. Taylor, trustee of William S. Moore, acknowledged this deed to Thomas Irwin, jun., to be his act and deed, which is ordered to be recorded.

Teste: EDM. J. LEE, *C. C.*

A true copy. Teste: JEFFERSON TACEY, *Clerk.*

[Revenue stamp, 5 cts.]

Plaintiff's costs, $10 59; defendant's costs, 96 cts.

From the record, a complete copy.
Teste: JEFFERSON TACEY, *Clerk*

[Revenue stamp, 5 cts.]

43 VIRGINIA:

At a supreme court of appeals, held at the capitol, in the city of Richmond, on Thursday, the seventh day of May, 1868—

DAVID TURNER, PLAINTIFF,
against
R. M. SMITH & J. M. SMITH, DEFENDANTS.

Upon a writ of supersedeas to a judgment rendered by the district court for the fourth judicial district, held at the town of Fredericksburg, on the tenth day of January, 1868, affirming, with costs, a judgment recovered by the defendant against the plaintiff in the circuit court of Alexandria, on the 28th day of June, 1867.

This cause being this day partly heard upon the transcript of the record of the judgment aforesaid, and the arguments of counsel, is continued until to-morrow.

44 At a supreme court of appeals, held at the capitol, in the city of Richmond, on Friday, the 8th day of May, 1868—

DAVID TURNER, PLAINTIFF,
against
R. M. AND J. M. SMITH, DEFENDANTS.

Upon a writ of supersedeas to a judgment rendered by the district court for the fou'th judicial district, held at the town of Fredericksburg.

This cause was this day fully heard upon the transcript of the record of the judgments aforesaid, and the arguments of counsel, but because the court here are not yet advised of the judgment to be rendered in the premises, time is taken to consider thereof.

45 At a supreme court of appeals held at the capitol, in the city of Richmond, Thursday, the second day of July, 1868—

DAVID TURNER, PLAINTIFF,
against
RICHARD M. SMITH AND JAMES M. SMITH, DEFENDANTS.

Upon a writ of supersedeas to a judgment rendered by the district court, held for the fourth judicial district at the town of Fredericksburg, on the 10th day of January, 1868, affirming, with costs, a judgment recovered by the defendants against the plaintiff in the circuit court of Alexandria County, on the 28th day of June, 1867.

This day came the parties, by their counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid, and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the said judgments; therefore it is considered that the same be affirmed, and
46 that the defendants recover against the plaintiff, damages according to law, and also their costs by them about their defence in this behalf expended.

Which is ordered to be certified to the said district court, the clerk of which is ordered forthwith to certify the same to the clerk of the said circuit court.

A copy. Teste: H. A. CURTIS, *C. C.*

STATE OF VIRGINIA,
Supreme Court of Appeals, Richmond, Virginia:

I, H. A. Curtis, clerk of the supreme court of appeals of Virginia, do certify that the foregoing manuscript pages, numbering from one to three, inclusive, containing the petition for appeal, and the allow-
47 ance of a writ of supersedeas in the supreme court of appeals of Virginia, and printed pages hereto annexed and following, numbered from one to thirty-two, inclusive, and manuscript copy of hearings and final judgment of said court also hereto annexed, contain a full, complete, and correct transcript of the record and proceedings in the cause of David Turner, appellant, against Richard M. Smith et al., appellees.

In testimony whereof I hereunto subscribe my name as clerk of said court, and certify that the supreme court of appeals of Virginia has no official seal, this 8th day of February, one thousand eight hundred and seventy, at the city of Richmond, and State of Virginia.

H. A. CURTIS, *Clk.*

(Indorsement on cover:) No. 412. David Turner, appellant, vs. James M. Smith. Virginia ct. of appeals. Filed 15th December, 1870.

SUPREME COURT OF THE UNITED STATES.

No.

DAVID TURNER, Appellant,

vs

JAMES M. SMITH, Appellee,

Appeal from the Supreme Court of Appeals of the Commonwealth of Virginia.

BRIEF OF FRANCIS L. SMITH,

Counsel For Appellant

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1871,

DAVID TURNER, Plaintiffi n Error,
vs.
JAMES SMITH, Defendant in Error.

ERROR TO SUPREME COURT OF APPEALS OF VIRGINIA.

BRIEF

OF FRANCIS L. SMITH, FOR APPELLANT.

STATEMENT OF THE CASE.

The record shows that in May, 1861, R. M. & J. M. Smith were the occupants, and claimed to be the owners, of a house and lot of ground particularly described in the proceedings, situate in the city of Alexandria, Virginia. At the commencement of the civil war, they abandoned their residence, and went within the military lines of the Confederate States. On the 1st day of March, 1864, the said property was sold by the Tax Commissioners, under authority of the act of Congress "for the collection of direct taxes in insurrectionary districts, within the United States, and for other purposes;" and purchased by the appellant, David Turner, who fully complied with the terms of sale, and to whom a Tax Sale Certifiacte was executed by said Commissioners.—(See Rec. p. 14), Turner was thereupon placed in possession of the property, and still continues in possession.

After the close of the war, the Smiths instituted a proceeding against Turner upon a warrant of distress for rent, claiming that they were the owners of a yearly rent charge of two hundred and twenty-four dollars, issuing out of, and charged upon said house and lot. The warrant was levied upon the property of Turner, who gave a forthcoming bond, which being forfeited, proceedings were taken to obtain judgment thereon. Turner, under authority of the Statute of Virginia, made defence, claiming that there was no rent due the Smiths, and that the distress was otherwise illegal. The jury found a special verdict, (Rec. from page 10 to 15 inclusive,) upon which the Court rendered a judgment in favor of plaintiffs. To this judgment Turner obtained a writ of error tothe Fourth Judicial District Court, and afterwards to the Supreme Court of Appeals of Virginia. Both of these affirmed the decision of the lower Court, the judges in the last named Court, being however, divided in opinon. The decision will be found reported in 18th Grattan's Reps., p. 830.

It appears from the special verdict, that William H. Hannon being seized in fee of a house and lot of ground in Alexandria, did, by deed bearing date the 19th day of November, 1819, with his wife, grant to

William S. Moore a yearly rent of two hundred and twenty-four dollars, payable on the 19th day of November and May in each year, forever, to be issuing out of and charged upon said house and lot, with right of distress and re-entry for non-payment of the rent.

On the 15th of July, 1825, Moore and wife conveyed this rent with other property, with the right of distress and re-entry to Robert I. Taylor, in trust, to secure a large debt owing by Moore to Thomas Irwin; and Moore having died insolvent, largely indebted to Irwin, Taylor, the trustee, sold and by deed dated the 9th day of December, 1830, conveyed the said rent, with the right of distress and re-entry to Thomas Irwin, Jr, who by deed dated the 17th day of February, 1831, conveyed the same to his mother, Elizabeth Irwin, who died seized thereof, and she dying intestate, the said rent descended to her children, who, by deed, dated the 21st of March, 1854, conveyed the same to R. M. & J. M. Smith. The grantors in this deed conveyed the said rent with "all "the right, title, and interest in law or equity which they had or held "in the said lot of ground (namely the lot of ground charged with the "said rent,) derived from any source whatever; also, all incidents and "arrears of said rent to the full extent to which they were then enti-"tled to them in anywise."

The special verdict further finds that William H. Hannon died insolvent about the year 1821, and thereupon the said William S. Moore took possession of said property, and held the same until the sale by Taylor under the deed of trust. That the said house and lot of ground were, from the year 1821 to the 1st of March, 1864, in the actual possession under claim of title of those under whom the said Smiths' claim the said rent charge. That the taxes during this period of time were assessed on said real estate to the parties to whom the said rent was conveyed, and were paid by them. The special verdict also finds the sale by the Tax Commissioners to David Turner, his compliance with the terms of sale, the Tax Sale Certificate to him as purchaser, and that Turner immediately after the sale was put in possession of the property. Upon this state of facts the plaintiff in error will maintain.

That the fair legal inference and presumption from all the facts stated in the special verdict, is, that William S. Moore, under the covenants in the deed from Hannon and wife, about the year 1821 entered upon the possession of the house and lot, and thereafter held the same as his absolute estate.

This entry upon possession of the property was under claim of title, and those under whom the Smiths' claimed held possession continuously from 1821 to the tax sale in 1864, a period of 43 years, long enough to bar any action which might be brought to recover possession of the property. The general limitation in an action to recover land in Virginia is fifteen years, with a saving of ten years in addition in favor of those laboring under disabilities,

Code of Va., chap. 149, page 633.

That the lapse of time, from 1821 to 1864 was sufficient to raise a presumption of grant to R. M. & J. M. Smith, or those under whom they claimed, and a release from the heirs of Hannon of whatever title or interest in the property descended to them upon his death.

However informal may have been the re-entry by Moore, or those claiming under him, no exception could be taken at the institution of these proceedings. The Code of Va., chap. 139, sec. 25, provides that

"No person who, or those under whom he claims, shall have been "possessed of lands by virtue of a re-entry for term of two years af- "ter the commencement of this act, shall be disturbed therein by suit "or otherwise for any defect of proceedings of such entry."

The Code went into effect 1st July 1860

The Smiths and those under whom they claim are *estopped in pais*, from disclaiming the absolute ownership of the property.

It was assessed to them *as owners.*

They paid the taxes, State and Municipal, upon it *as owners.*

They occupied it *as owners.*

Moore, under whom they claim, exercised ownership over the property by leasing the same to James Green for term of ten years.

Tucker's Blac. Book 3, page 258, and note referring to 1 Sanders, Plg. and Ev. 44, and other authorities.

The clause in the deed from the heirs of Elizabeth Irwin, above quoted, has an important and significant bearing on this point. If a conveyance of the rent was all that was intended by that deed why should the grantors also convey "all the right, title, and interest in law "or equity which they have or hold in and TO THE LOT OF GROUND "AFORESAID derived from any source whatever?" If it was only meant to convey the ground rent, this portion of the deed was wholly useless. But it evidently strongly implies, and so it was received by the grantees, that the heirs of Irwin, did own, and intended to convey, something more than the rent charge, and had some title TO THE LOT OF GROUND described in the deed.

There was a *merger* of the rent charge by the re-entry of Moore.—From that time there ceased to be two seperate estates on the property.

Mayhew on Merger, page 8,

The ground rent was as absolutely extinguished by the re-entry of Moore as if the heirs at law of Hannon had conveyed and released all their right and title to the property.

[redacted] Chester vs. Willis, Ambler Reps. 246. Hood vs. Phillips, 3 Beavan 513.

[redacted] Bulkey vs. Hope, 1 Kay and John, 482. Forbes vs. Moffett, 18 Ves. jr. 384.

That the relation of landlord and tenant ceased to exist from 1821, when Moore re-entered on the property.

Turner acquired an absolute title to the property in fee simple free and discharged from all prior liens, incumbrances, right, title, and claim whatsoever, by his purchase at the tax sale on the 1st of March, 1864, and so soon as he had complied with the terms of sale. That he did so comply by paying the purchase money is established by the Tax Certificate,

Effect of Certificate of Sale, (see Rec., p. 14.)

By the act of the Congress of the United States, of June 7th, 1862, Sec. 4, it is provided that "the title of, in, and to each and every piece "or parcel of land upon which said tax has not been paid, as above pro- "vided, shall thereupon become forfeited to the United States, and upon "the sale hereinafter provided for, shall vest in the United States, "or in the purchaser, at such sale in fee simple, free, and discharged "from all prior liens, incumbrances, right, title, and claim whatso- "ever."

The latter part of section 7 of said act provides that the Tax Commissioners shall, after the sale and the payment of the purchase money, issue a certificate to the purchaser as evidence of his title, and the last clause of the section declares that such certificate shall only be effected as evidence of the regularity and validity of the sale, by establishing the fact that the property sold was not subject to taxation, or that the taxes had been paid previous to the sale, or that the property had been redeemed according to the direction of the act.

The certificate of the Tax Commissioners is therefore the muniment of a complete and absolute title to the property in Turner, the purchaser. Congress had the power to declare what effect such a certificate of title should have. See Blackwell on Tax Titles, page 79 to the end of chapter III.--and in cases cited.

FRANCIS L. SMITH,
Counsel for Plaintiff in Error.

December 28th, 1871.

SUPREME COURT

OF THE

UNITED STATES.

NO. 202.

DAVID TURNER, Appellant,

vs.

JAMES M. SMITH.

Brief of C. W. Wattles, ~~Counsel~~ Counsel for Appellee.

STATEMENT OF CASE.

This was a proceeding upon a warrant of distress issued by a Justice of the Peace for the county of Alexandria in April, 1867, at the suit of R. M. and J. M. Smith against David Turner. Upon the levy of the warrant, Turner gave a forthcoming bond, which was forfeited. The bond was given under chap. 189—page 780 of the code of Virginia and the proceedings provided for in said chapter are substituted for the action of Replevin. At the trial a special verdict was found, by which it appears that the said R. M. and J. M. Smith became the owners of a certain *Rent charge in fee* issuing out of a piece of land in Alexandria, Va., that they were at the breaking out of the war in 1861 in possession of the property under no act of Re-entry, but merely as occupants. The special verdict will show their title to the Rent, and how they came to occupy the premises. A judgment was rendered for the said R. M. and J. M. Smith in the Circuit Court for Alexandria County. See opinion of Judge—page 16 of Record.

The case was carried to the Supreme Court of Appeals of Virginia and the judgement of the Circuit Court was affirmed. See 18 Grattan page 830.

The Court was not divided as intimated in the Brief of Appellant, but a majority of the Court were in favor of affirming the judgment of two Courts, to wit:—the Circuit Court for Alexandria and the District Court of Appeals.

We rely principally upon the case in Grattan and the authorities there cited, and at the hearing will review the cases referred to in the Appellant's brief.

The code of Virginia—chap. 139—page 621—section 25 is referred to in brief of Plaintiff in Error. We contend that it has no application here. It provides for a case when *a person shall have been possessed of lands* by virtue of a Re-entry.

The special verdict from which nothing can be presumed or implied, does not find any act of Re-entry, but only shows that the *owner* of the rent change took possession of the premises. If any inference is to be drawn, are we not entitled to say, that it was an act of trespass upon his part and in violation of the rights of the tenant.

For the mode of proceeding to make and complete an act of Re-entry, see 1 Lomax's Digest—chap. 1—*Rent*, page 553. See Conner vs. Bradley—1 How'd. 211.

There is no proof that the necessary formalities were followed or that the law in any particular was complied with. No time will run against a Rent charge; we mean to divest title or extinguish the rent. The limitation only applies to the recovery of rent in arrears by distress or action. The estate itself remains for all time unless merged or extinguished. See Lomax's Digest; chap. 2—Rent, page 563. Section 12. The principal is elementary.

From the special verdict, it appears that the title to the land was in Hannon's heirs at the time of the tax sale.

The pretence is, that the Smiths were entitled to the land by the deed from the Irwins. See page 12 of Record. But it is evident that the parties under whom the Irwin's held were entitled to the Rent charge alone, and did not pretend to have any title to the land. Hence there were two separate and distinct estates;

a fee simple title to the land in Hannon's heirs, a corporeal hereditament, and a fee simple title to the Rent charge in the Smith's an incorporeal hereditament. The land itself was sold for the tax, the rent remaining intact.

The points made in the Court below were as follows:—

1st. That the act of Congress under which the sale was made is unconstitutional and void.

2d. That the tax Commissioner in making the sale in the present case, exceeded the authority conferred by the act, so that the sale was void.

3d. That whatever may be the operation of the tax sale upon the title to the land itself, it had no effect upon the title to the ground rent, which was a separate and distinct estate. See Irwin vs. Bank of United States—1 Barb. R. 349.

The first point is submitted to the Court without argument.

The second is eloborately discussed by Judge Joynes in 18th Grattan, pages 835, 836, 837, 838, 839, 840 and 841.

The third point I have already discussed and will add that the act provided *only* for the sale of the land and not the rent, and that it would be a forced construction to say that an incorporeal hereditament is a lien, incumbrance upon, or a right title or claim to land in the sense contemplated by the act, for the Rent may have been held by a citizen residing in a State not in insurrection, who could have no notice of a contemplated sale of his property either directly or by the terms of the act, as it does not provide for a tax upon such species of property.

C. W. WATTLES,
Counsel for Defendant in Error.

Statutes of 1862 and 1863.

12 Stat. — 422

" — 640